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Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, and 15-191

IN THE

Supreme Court of the United States

DAVID A. ZUBIK, ET AL., PETITIONERS,

v.

SYLVIA BURWELL, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, FIFTH, TENTH, AND D.C. CIRCUITS

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection may not fulfill its regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONER

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgments of the United States Court of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 118 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has 61 affiliate member institutions with Christian missions. The CCCU's membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost two million alumni.

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent are on file with the Clerk's Office.

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's best-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, religious institutions were motivated to train abolitionists in the early 1800s who contributed to the end of slavery decades later. For example, Oberlin College, then a Presbyterian college led by revivalist preacher Charles Finney, was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, another center of abolitionist training.

Petitioners East Texas Baptist University, Geneva College, Houston Baptist University, Oklahoma Baptist University, and Southern Nazarene University are CCCU members. Like all CCCU member institutions, the Christian colleges and university petitioners are committed to applying Christian doctrine and belief to all areas of human endeavor. That includes beliefs about when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products.

Many CCCU members have concluded that complying with the government's alternative mechanism to make abortifacient products available through their health plans makes them complicit in the taking of innocent lives. This leaves those institutions with a Hobson's choice: act inconsistently with the religious doctrines they promote

and sincerely believe, or violate the government's edict and face crippling sanctions that will financially cripple the institutions. For that reason, in an unprecedented series of lawsuits, 19 CCCU member institutions have challenged the federal mandate requiring member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients. Two CCCU members, Cornerstone University and Dordt College, were parties to the Eighth Circuit's decision holding that the government's alternative means to comply with the contraceptive mandate violates the Religious Freedom Restoration Act. *Dordt College* v. *Burwell*, 801 F.3d 946 (8th Cir. 2015).

The decisions of the Third, Fifth, Tenth, and D.C. Circuits are inconsistent with the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations.

SUMMARY OF ARGUMENT

Petitioners have amply demonstrated that the government substantially burdens their religious exercise by requiring them to comply with the government's alternative means of using their health plans to provide objectionable contraceptive or abortifacient products, or face crippling fines. The sincerity with which Petitioners' beliefs are held by Christian colleges and universities is illustrated by the painful decisions of Franciscan University of Steubenville and Ave Maria University to terminate their student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to their students. See Libby A. Nelson, College Ends Student Health Plan, Inside Higher Ed (May 16, 2012) *available at* http://tinyurl.com/nna7jjc; Ave Maria University Discontinues Student Health Insurance Because of Federal Government's Mandate (May 21, 2012) *available at* http://tinyurl.com/p8r4fx2. Accordingly, the government bears the burden of proving that requiring Petitioners to comply with the challenged regulations is the "least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000bb-1. This it cannot do.

The administration's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally, or a subset of FDA-approved contraceptives that operate as abortifa-

cients, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers from the contraceptive mandate altogether does not impair its interests. Many religious organizations, including all of CCCU's member institutions, restrict their hiring for most or all positions to co-religionists. And these institutions' religious exercise is indistinguishable from that of exempt religious employers. Both teach the faith, engage in regular corporate worship, pray, provide religious education, and provide faith-based volunteer and social services.

In other words, the government's distinction between which religious organizations are exempt and which are administratively accommodated is arbitrary and unnecessary for the effectiveness of the Affordable Care Act. The government's interests will not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. This is precisely what most states have done when confronting this issue. Consequently, this is precisely what the Religious Freedom Restoration Act requires.

ARGUMENT

Imposing the contraceptive mandate on religious entities does not advance the government's interest in the least restrictive manner.

It is difficult, if not impossible, to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and their integrated auxiliaries from the mandate. Likewise, this contention is inconsistent with the experience of various states which have implemented statutory requirements for contraceptive coverage in health-insurance plans.

1. Under the Affordable Care Act, employer-sponsored group health plans must meet minimum-coverage requirements. These requirements include covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines.

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A).

Congress requires tax-exempt nonprofit organizations to file informational tax returns "to provide the Internal Revenue Service with the information needed to enforce the tax laws." H.R. Rep. No. 413, at 36 (1969). In other words, informational returns are required to allow the IRS to police whether a given entity continues to be tax exempt. Congress was not seeking to determine which organizations were religious and which were not.[2] And Congress did not create a tripartite system in which churches and their integrated auxiliaries were exempt from filing informational returns, other religious nonprofits were required to provide modified informational returns, and nonreligious nonprofits were required to provide complete informational returns. The Departments, however, have created exactly such a

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[2] Indeed, such a goal and inquiry would likely impermissibly entangle the federal government with religion. See *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971) (stating that a statute "must not foster 'an excessive entanglement with religion' ").

tripartite structure here, distinguishing between exempt religious employers and all other religious nonprofits whose religious exercise the government treats as junior varsity.

According to the Departments, religious colleges and universities are junior varsity religious employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources. See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The Departments theorize that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The Departments offer no support for this assumption, and have refused to alter their approach in spite of pleas from organizations like *Amicus* and its member institutions who hire only co-religionists. For example, an independent seminary is just as likely as a church-affiliated seminary to employ people of the same faith who share the same objection. The same is true for a religious college or university.

The government's decision to exempt fully a category of entities—religious employers—regardless

of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by the contraceptive coverage requirement [because they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. This is no less true for religious non-profits. For instance, all CCCU member institutions, like many other religious nonprofits, restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. See CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/members_and_affiliates ("Member campuses must have a continuing institutional policy and practice to hire as full-time faculty members and administrators (non-hourly staff) only persons who

profess faith in Jesus Christ."). Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners' religious exercise would undermine the government's interests.

2. The government's contention that complying with the challenged regulations is the least restrictive means of ensuring access to contraceptives is further belied by surveying the approach states have taken to the same question. As one would expect, the fifty states have taken a variety of approaches to how they exempt religious organizations from state insurance laws requiring contraceptive coverage. In other words, states with the same policy goals of the federal government—full contraceptive coverage—have taken differing approaches to how they exempt entities from their contraceptive mandates. Indeed, state contraceptive mandates are often *much more* protective of religious liberty than the federal government's approach.

Many states have adopted an expansive approach to exemptions with respect to contraceptive mandates. Connecticut and Delaware exempt religious employers from providing insurance coverage for contraceptive methods that "are contrary to the religious employer's bona fide religious tenets." Conn. Gen. Stat. Ann. § 38a-503e(b)(2); see also Del. Code Ann. tit. 18, § 3559(d). Connecticut defines a "religious employer" as a church or a tax-exempt organization controlled by a church or any "church-affiliated organization." Conn. Gen. Stat. Ann. § 38a-503e(f). Delaware does not even define "religious employer."

Missouri goes even further to protect religious beliefs. It requires a health carrier to offer a health benefit plan "that excludes coverage for contraceptives if the use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets" of a person or entity. Mo. Ann. Stat. § 376.1199(4). Missouri also exempts a health carrier from the contraceptive mandate if it "is owned, operated or controlled in substantial part by an entity that is operated pursuant to moral, ethical or religious tenets that are contrary to the use or provision of contraceptives." Mo. Ann. Stat. § 376.1199(4)(3). And (as one would expect), there is no indication whatsoever that these broader exemptions are undermining the larger policy goals of these states. See also Haw. Rev. Stat. Ann. § 431:10A-116.7(a) (extending exemption to "any educational, health care, or other nonprofit institution or organization owned or controlled by the religious employer); Md. Code Ann., Ins. § 15-826(c)(1) (granting exemption where "required coverage conflicts with [a] religious organization's bona fide religious beliefs and practices"); N.M. Stat. Ann. § 59A-22-42(D); W Va. Code Ann. § 33-16E-7(a) & W Va. Code Ann. § 33-16E-2(5) (defining religious employer broadly).

Other states, while not adopting as broad an approach as these states, still have adopted a broad approach in protecting religious conscience. For instance Maine requires contraceptive coverage but states that a "religious employer may request an exclusion" if the contraceptive "coverage conflicts with the religious employer's bona fide religious beliefs and practices." Me. Rev. Stat. tit. 24, § 2332-J(2). Maine's statutory scheme defines "religious

employer" as any employer that "is a church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches" and qualifies for 501(c)(3) status. *Id.* New Jersey, Rhode Island, and Massachusetts are among the other states that have adopted this approach. N.J. Stat. Ann. § 17:48-6ee; 27 R.I. Gen. Laws Ann. § 27-18-57(c); Mass. Gen. Laws Ann. ch. 175, § 47W(c).

Just three states have taken an approach resembling the Departments' extremely restrictive approach. N.Y. Ins. Law § 3221; Or. Rev. Stat. Ann. § 743A.066(4); Cal. Ins. Code § 10123.196(e).

In sum, a simple state survey demonstrates that the government's proffered justifications for refusing to apply the exemption to Petitioners and similarly-situated entities does not comport with even minimal scrutiny, much less strict scrutiny. States continue to employ a wide-variety of approaches to exempting religious entities and those with moral objections to contraceptive mandates without undermining the states' larger goals of supplying contraceptive coverage to their citizens. It is not that the federal government cannot extend its exemption; it is that the federal government has selected an arbitrary line to which it is stubbornly affixed.

3. The government's method for distinguishing between exempt religious employers and religious employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code

exempts churches from filing informational tax returns, but not other 501(c)(3) religious organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on churches and could chill religious exercise. But the distinction Congress drew was not intended to address religious objections to filing informational tax returns. It is beyond strange to apply that same distinction to decide which religious nonprofit organizations' civil rights deserve second-class treatment.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries, including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors

religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith through other means, such as fulfilling their educational missions or that for theological reasons are organized in ways that do not fit neatly within the government's box. Again, it is difficult to discern what would motivate the government to think that it, and it alone, gets to determine who is "religious."

The absurdity of the Departments' distinction between exempt religious employers and non-exempt religious employers is shown by the treatment of seminaries. Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Seminaries that are not affiliated with a church or association of churches are not exempt, even though they provide exactly the same service (training ministers), and even if they hire only co-religionists as employees.

If, for theological reasons, a seminary is established independent from any church, synagogue, or denomination, that seminary is not exempt. But if the seminary is affiliated with a denomination, it is exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Indeed, Petitioner Westminster Theological Seminary falls into this very situation. It is a Presbyterian seminary, unaffiliated with any Presbyterian denomination. Its founders had been professors at a denominationally-affiliated seminary that was redirected in a manner inconsistent with

Reformed and Presbyterian orthodoxy. According to the government, this historic and theological decision puts Westminster Theological Seminary's religious exercise in the junior varsity.

Civil rights should not vary based on whether that institution is or is not affiliated with a church or other house of worship. Religious exercise is not tied to one's affiliation but rather the source and sincerity of one's belief and the desire to exercise it. That truth appears to be one the government has been unable to grasp or comprehend as it decides who is sufficiently "religious" to have religious beliefs worthy of protection.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the Departments view "religion." But wholly aside from the problems inherent with the accommodation, it violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt religious employers is not the least restrictive means for advancing the government's interests.

CONCLUSION

The judgments of the Third, Fifth, Tenth, and District of Columbia Circuits should be reversed. Religious employers are guaranteed the right to freely exercise their religious beliefs without interference from the government. For *Amicus'* members institutions, this means being free to exercise those beliefs consistent with the doctrines and religious practices the institutions are teaching their students. Religious educational institutions cannot be coerced into hypocrisy.

Respectfully submitted,

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